

Office of Chief Counsel
Internal Revenue Service

memorandum

CC:LM:NR:[REDACTED]:TL-N-POSTU-151157
[REDACTED]

date: Jun 27 2002

to: [REDACTED], Senior Team Coordinator
[REDACTED] Examination
[REDACTED]

from: Area Counsel
(Natural Resources: [REDACTED])

subject: Form 872 - [REDACTED] and Subsidiary Companies

This writing may contain privileged information. Any unauthorized disclosure of this writing may have an adverse effect on privileges, such as the attorney-client privilege. If disclosure becomes necessary, please contact this office for our views.

This is in response to your request for assistance regarding the proper styling and execution of Form 872, Consent to Extend the Statute of Limitations, for the taxable years ending December 31, [REDACTED] and [REDACTED] of [REDACTED] and Subsidiary Companies (EIN [REDACTED]), in light of the fact that [REDACTED] (EIN [REDACTED]) on [REDACTED] acquired [REDACTED] (EIN [REDACTED]) in a merger under I.R.C. § 368(a)(1)(B). We have coordinated this advice with the Office of Chief Counsel, Corporate, which Office agrees with our views herein.

FACTS

[REDACTED] and Subsidiary Companies (hereinafter referred to as [REDACTED] or [REDACTED] (EIN [REDACTED]), a Delaware corporation, for the taxable year ending December 31, [REDACTED] and the short period ending [REDACTED], filed its federal corporate income tax return as the common parent of a consolidated group under section 1502 of the Internal Revenue Code. The Internal Revenue Service examines [REDACTED]'s return on a yearly basis as part of the Coordinated Industry Case (CIC) program. The original three year statute of limitations for the [REDACTED] taxable year will expire [REDACTED]. The original three year statute of limitations for the short taxable year ending [REDACTED] will expire [REDACTED]. LMSB and the taxpayer now wish to agree to extend the statute of

limitations with respect to both the [REDACTED] taxable year and the short period ending [REDACTED], until [REDACTED].

On [REDACTED], [REDACTED] (EIN [REDACTED]), a [REDACTED] corporation, acquired [REDACTED] in a stock for stock transaction under Code Section 368(a)(1)(B). To effect the merger, [REDACTED] created a wholly-owned first tier subsidiary ([REDACTED] a Delaware corporation), which merged with and into [REDACTED] with [REDACTED] (EIN [REDACTED]) surviving the merger and thus becoming a wholly owned subsidiary of [REDACTED] (EIN [REDACTED]) then changed its name to "[REDACTED]" (hereinafter "[REDACTED]"). Under the terms of the merger agreement, approximately [REDACTED] shares of [REDACTED] common stock were issued in exchange for all the outstanding shares of [REDACTED] common stock, based on an exchange ratio of [REDACTED] shares for each [REDACTED] share. Each outstanding share of [REDACTED] preferred stock was converted into one share of a new class of [REDACTED] preferred stock. Following the exchange, former shareholders of [REDACTED] owned approximately [REDACTED] percent of the combined company and former [REDACTED] shareholders owned approximately [REDACTED] percent. [REDACTED], the former common parent of the [REDACTED] and Subsidiary Companies consolidated group, remains in existence, as a subsidiary of [REDACTED].

LAW & ANALYSIS

Treas. Reg. § 1.1502-77(a) provides in pertinent part that the common parent of a consolidated group is "the sole agent for each subsidiary in the group, duly authorized to act in its own name in all matters relating to the tax liability for the consolidated return year." The regulation continues, "(T)he common parent will file claims for refund or credit, . . . and the common parent in its name will give waivers . . . and any waiver . . . or any other document so executed shall be considered as having also been given or executed by each (such) subsidiary." (Emphasis added.) Treas. Reg. § 1.1502-77(c) provides that, unless the district director agrees to the contrary, an agreement entered into by the common parent extending the time within which an assessment may be made in respect of the tax for a consolidated return year shall be applicable (1) to each corporation which was a member of the group during any part of such taxable year; and (2) to each corporation the income of which was included in the consolidated return for such taxable year, notwithstanding that the tax liability of any such corporation is subsequently computed on the basis of a separate return under Treas. Reg. § 1.1502-75. The Tax Court in Southern Pacific Co. v. Commissioner, 84 T.C. 395

(1985) interpreted these regulations and explained that, for any year with respect to which a consolidated return is filed, the common parent with respect to that consolidated return is thereafter the sole agent with respect to any procedural matter "that may arise in connection with the group's tax liability for that year. The Southern Pacific court noted that "[o]bviously, if the existence of the common parent were to terminate after the filing of a consolidated return for a particular year, the agency relationship would terminate." 84 T.C. at 401. That is not the situation in the instant case, however.

[REDACTED] was the common parent of the [REDACTED] and Subsidiary Companies consolidated group for the [REDACTED] and [REDACTED] years for which you seek an extension of the statute of limitations, and remains in existence. Since [REDACTED] still exists, albeit now as a subsidiary of [REDACTED] rather than as a common parent in its own right, [REDACTED] under Treas. Reg. § 1.1502-77 is the proper entity to enter into the Form 872 for the years [REDACTED] and [REDACTED].

The same conclusion obtains under Temp. Treas. Reg. § 1.1502-77T, *Alternative agents of the group (temporary)*, applicable to waivers of the statute of limitations for taxable years for which the due date of the consolidated return is after September 7, 1988, and which thus also applies to the years at issue herein.

Temp. Treas. Reg. § 1.1502-77T(a) applies when the corporation that is the common parent of the group ceases to be the common parent, whether or not the group remains in existence under section 1.1502-75(d). Temp. Treas. Reg. §§ 1.1502T-77(a)(3) and (4)(i) together provide that any waiver of the statute of limitations given by the common parent of the group for all or any part of the year to which the waiver applies is deemed to be given by the agent of the group.¹ Thus, [REDACTED]

¹ Although Temp. Treas. §§ 1.1502-77T(4)(ii), (iii), and (iv) provide for additional alternative agents under certain circumstances, none of these alternatives fit the facts herein. Section 1.1502-77T(4)(ii), providing that a successor to the former common parent may under certain circumstances qualify as alternative agent, is inapplicable because the [REDACTED] section 368(a)(1)(B) merger, as a "B" reorganization, was not "a transaction to which section 381(a) applies," as required by the temporary regulation. Section 1.1502-77T(4)(iii) applies only in the event of dissolution of the former common parent, a situation similarly not present herein, and Section 1.1502-77T(4)(iv) is inapplicable because the merger was neither a section

[REDACTED], as common parent of the former [REDACTED] and Subsidiary Companies consolidated group, is the proper agent under Temp. Treas. Reg. § 1.1502-77T, as well as under Treas. Reg. § 1.1502-77. We recommend that the Form 872 be captioned in the name of [REDACTED] and Subsidiary Companies (EIN [REDACTED]), Common Parent of the [REDACTED] and Subsidiary Companies Consolidated Group*. The asterisk should reference, in the space immediately preceding the signature area, the following language: "This is with respect to the consolidated tax liability of [REDACTED] and Subsidiary Companies (EIN [REDACTED]) for the taxable years ended December 31, [REDACTED], and [REDACTED]." [REDACTED]'s EIN should appear in the EIN box on the Form 872. The space on the Form 872 in the signature area entitled "Corporate Name" should also be filled in with [REDACTED] and Subsidiary Companies (EIN [REDACTED]).

The consent should be signed by a current officer of [REDACTED], authorized to act on its behalf in tax matters.

Attached for your ease of reference as an example is a Form 872 completed as recommended herein. Please use Form Letter 907, which outlines the taxpayer's rights in connection with extending the statute of limitations, when transmitting the consent to the taxpayer for signature, and please do not

368(a)(1)(F) reorganization nor a reverse acquisition as contemplated by those sections of the temporary regulation.

hesitate to contact this office should you need further assistance.

[REDACTED]
Associate Area Counsel
(Large and Mid-Size Business)

By: _____

[REDACTED]
Special Litigation
Assistant (LMSB)

Attachments